United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-2138

B/P

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel.,
MARTIN KAHN and ERNEST FENDT,

Petitioner-Appellants,

-against-

WALTER J. FLOOD, as Warden of the Nassau Correctional Facility, and the PEOPLE OF THE STATE OF NEW YORK by and through the HON. DENIS DILLON, District Attorney of the County of Nassau,

Respondent-Appellees.

Appeal from the United States District Court for the Eastern District of New York

BRIEF AND APPENDIX FOR PETITIONER-APPELLANTS MARTIN KAHN AND ERNEST FENDT

SCHULMAN & LAIFER, ESQS.
Attorneys for Petitioner-Appellants
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UNITED STATE COURT OF APPEALS
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UNITED STATES OF AMERICA, ex rel.,
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-against-

WALTER J. FLOOD, as Warden of the Nassau Correctional Facility, and the People of the State of New York by and through the Hon. Denis Dillon, District Attorney of the County of Nassau,

Respondents.

Appeal From the United States District

Court for the Eastern District of New York

BRIEF FOR APPELLANTS MARTIN KAHN
AND ERNEST FENDT

STATEMENT

The appellants appeal from a judgment rendered in the United States District Court for the Eastern District of New York (Pratt, J.) rendered July 16, 1976, dismissing the petition for a writ of habeas corpus.

On October 7, 1974, petitioners were convicted of possession of gambling records in the first degree based upon

their pleas of guilty entered July 11, 1974 in the Nassau County Court, Nassau County, New York. Petitioner Kahn was sentenced to a monetary fine and a ten month period of incarceration. Petitioner Fendt was sentenced to a monetary fine and a 45 day term of incarceration.

On January 28, 1976, the Appellate Division of the Supreme Court of the State of New York Second Judicial Department unanimously affirmed the petitioners' convictions without opinion.

On March 4, 1976 the Hon. Sol Wachtler, Associate Judge of the New York State Court of Appeals, denied petitioners' application for leave to appeal to said Court.

On May 5, 1976, Petitioners sought a writ of Habeas Corpus in the United States District Court for the Eastern District of New York. Said Petition was dismissed by order of Judge Pratt on July 16, 1976.

A Notice of Appeal was duly filed on August 5, 1976 and by order of Judge Pratt, entered September 24, 1976 a Certificate of Probable Cause was granted.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Does the Supreme Court's Decision In Stone v. Powell Preclude the Petitioners writ of Habeas Corpus Seeking Federal Review of their State Court Convictions?

FACTS

Following Petitioners arrest and prior to their pleas of guilty, petitioners brought on a motion to suppress physical evidence seized pursuant to a search warrant on the basis of the lack of probable cause due to the insufficiency of the underlying affidavits and testimony before the issuing judge. Said motion was denied, but a hearing was granted on the issue of veracity and accuracy of the affidavit and testimony A-14, 15

The hearing was held before the Hon. Douglas F. Young, Nassau County Court Judge, who held that petitioners had failed to prove perjury by the affiant and, therefore, the motion to suppress was denied. A-1-9, 16

The petitioner's convictions were unanimously affirmed in the Appellate Division of the Supreme Court of the State of New York and leave to appeal to the Court of Appeals was denied. A-10,11

On May 5, 1976, petitioners filed a writ of Habeas Corpus, in the United States District Court for the Eastern District of New York seeking to overturn their state court convictions.

The petitioners alleged they did not receive a full, fair and adequate hearing in the state court proceedings in that the trial judge refused to consider the material misstatements and misrepresentations of fact contained in the affidavit and testimony in support of the search warrant as was established at the hearing. A-12 to A- 20

The petition alleged that the trial Court limited its inquiry solely to the issue of perjury by the affiant, following the New York State Court of Appeals ruling in People v. Alfinito, and by reason of such limitation and the following inaction by the appellate courts, the petitioner's Fourth Amendment Rights were violated. A-12 to A-20.

In its memorandum and order dismissing the Petition, the Court indicated

> "Whatever may be the merits of petitioner's argument, we may not now consider them, for the Supreme Court in Stone v. Powell, (44 U.S. L. W. 5313) on July 6 1976 closed the federal District Courts to habeas review of state court search and seizure issues where the state has provided an opportunity for full and fair litigation of the claim." A-22,23

POINT ONE

THE APPLICATION OF STONE v. POWELL DOES NOT APPLY BY REASON OF THE FACT THAT PETITIONERS WERE DENIED A FULL AND FAIR LITIGATION OF THEIR FOURTH AMENDMENT CLAIM IN THE STATE COURT PROCEEDING.

Pursuant to the New York State Court of Appeals decision in PEOPLE v. ALFINITO, 16 NY 2d 181, holding

> "...that section 813-C of the Code of Criminal Procedure is to be construed so as to permit an inquiry as to whether the affidavit's statements were perjurious; second, that the burden of proof is on the person attacking the warrant (See United States v. Goodwin, 9 Cir., 1 F.2d 36; United States v. Napela, 2 Cir., 28 F.2d 898), and third, that any fair doubt arising from the testimony at the suppression hearing as to whether the affidavit's allegations were perjurious should be resolved in favor of the warrant since those allegations have already been examined by a judicial officer in issuing a warrant",

the trial court found that the defendants having failed to meet the burden of proof required to prove perjury, concluded that the motion to suppress must be denied. A-9

As indicated in Alfinito and reaffirmed by the trial court, although statements and misrepresentations of fact may be found in the application in support of the warrant, unless proven to be perjuriously made, they will not vitiate the warrant. A-7 This is true despite the fact that absent said misstatements and misrepresentations of fact, the allegations contained in the application may drop the proof below the level of probable cause.

In contrast to the limited scope of inquiry permitted under the New York State rule, case law in this circuit holds that

where the affidavit contains either deliberate or material misrepresentations that reduce the proof below probable cause the warrant should be declared invalid. United States v. Bozza, 365 F 2d 206, 223-24 (2d Cir 1966); United States v. Sultan, 463 F 2d 1066, 1070 (2d Cir. 1972); United States v. Gonzalez, 488 F 2d 837 (2d cir 1973); United States v. La Vecchea, 513 F 2d 1210, 1217-18 (2d Cir. 1975)

Pursuant to the Supreme Courts ruling in Stone v. Powell, supra., federal Habeas Corpus review of state court search and seizure issues is precluded where the state has provided an opportunity for a full and fair litigation of said issue. See Petillo v. New Jersey, 19 Criminal Law Reporter 2535 (USDC NJ). Thus, the issue to be determined by this Court is whether petitioners were denied a full and fair litigation of their Fourth Amendment claim by reason of the limited scope of inquiry permitted by the Alfinito rule.

As mandated by the Fourth Amendment to the United States Constitution, no warrants shall issue but upon a showing of probable cause.

As a means of implementing said constitutional guarantee, The New York State Legislature enacted Article 690 of the Criminal Procedure Law mandating, in part, that

> "2.The application must contain:
> (b) A statement that there is reasonable cause to believe that property of a kind or character described in section 690.10 may be found in or upon a designated or described place, vehicle or person; and
> (c) Allegations of fact supporting such statement..."

Criminal Procedure Law, sec. 690.35 Sd. 2 (b), (c)

It is the petitioner's contention that by reason of the test applied by this circuit and the requirements mandated by the New York State Legislature pursuant to CPL sec 690.35 Sd 2 (b), (c), a misstatement of fact is tantamont to no fact at all and if said misstatements were of a material nature, without which probable cause is not established, then the trial court in refusing to consider said misstatement denied petitioners an opportunity for a full and fair litigation of their claim.

Moreover, the fact that the trial Court followed the narrow New York State or Alfinito rule as enunciated by the New York State Court of Appeals, compounds the denial of due process by denying Petitioners adequate appellate review in the State level.

Although a state is free to develop its own law of search and seizure to meet the needs of local law enforcement, it may not authorize police conduct which touches upon the Fourth Amendment Rights, regardless of the labels which it attaches to such conduct. Sibron v. N. Y., 392 U.S. 40.

It is respectfully submitted that the limited scope of inquiry permitted under the New York State Alfinito Rule infringes upon the Petitioners' Fourth Amendment Rights to such an extent, that Petitioners were denied an opportunity

for a full and fair litigation of their Fourth Amendment claim.

CONCLUSION

FOR THE REASONS STATED HEREINBEFORE IT IS RESPECTFULLY SUBMITTED THE JUDGMENT DISMISSING PETITIONERS WRIT OF HABEAS CORPUS SHOULD BE REVERSED AND THE MATTER REMANDED TO THE DISTRICT COURT FOR FURTHER CONSIDERATION.

APPENDIX

290 Decision and Short Form Order of Hon. Douglas F. Young Dated June 19, 1974.

SHORT FORM ORDER

FORM N.80 - 5M - 9.70

COUNTY COURT — NASSAU COUNTY
SPECIAL TERM: PART X II

Present:
Hon DOUGLAS F. YOUNG
County Judge

Motion Cal. #
Indictment # 3371C

PEOPLE OF THE STATE OF NEW YORK

—against—

MARTIN KAHN and ERNEST PENDA,

Defendants

HON. WILLIAM CAHN
District Attorney
Nassau County
Mineola, New York

BRACKEN & SUTTER, ESQS.
Attorneys for Defendants
33 Willis Avenue
Mineola, New York 11501

The subject matter of this proceeding is a search warrant which was signed by a judge of this Court on January 20, 1973. Thereafter a motion was made attacking the grounds for the issuance of the search warrant, alleging lack of probable cause. A hearing was held by the issuing judge and an order was issued on May 31, 1973 sustaining the validity of the warrant. Thereupon the defendants made another motion attacking the validity of the issuance of the search warrant and seeking a hearing on that issue. This was brought on by an order to show cause and oral argument was heard by the issuing judge on October 24, 1973. Following argument on the motion the judge on November 2, 1973 ordered that a second hearing be held, immediately preceeding trial, "to determine the accuracy of the allegations contained in the supporting documents to the search warrant". The issuing judge who was also the administrative judge of the County Court, then assigned the case to me for the hearing and for trial.

The defendants' first point is based upon the argument that this hearing can only be properly heard and decided by the judge who issued the warrant. As defendants agree, this is not the situation dealt with in People v. McCall, 17 N.Y. 2d 152. The opinion in McCall states (p.155) that it is preferable to apply to the judge who made the order but that is a reference to a hearing on probable cause for the issuance of the warrant. In this matter, at its present stage, we deal with the "Alfinito" (People v. Alfinito, 16 N.Y. 2d 181) issue, (perjuriousness). The question as to the showing of probable cause has been litigated before the issuing judge, as stated above, and was determined by his order dated May 31, 1973 sustaining the warrant. I know of no ruling that the "Alfinito" issue can be decided only by the judge who issued the warrant. I hold that there is none.

In this New York jurisdiction it appears that the only basis for attack which remains to the defendant is the question of whether the affiant committed perjury. When the judge ordered this hearing he cited People v. Alfinito, supra; People v. Solimine, 18 N.Y. 2d 477; and People v. Cameron, 40 A.D. 2d 1034. These stand for the right to litigate the question of "whether the affidavit's statements were perjurious". People v. Alfinito, supra, page 185. Nevertheless the defendants seek to base their attack on other grounds.

The defendants' second point is stated thusly:

HAD THE ISSUING JUDGE KNOWN THE FACTS AS DEVELOPED IN THE HEARING HE WOULD NOT HAVE ISSUED THE WARRANT

Unfortunately this again avoids the point. The defendants continue to becloud the issue by injecting reference to "the issuing judge". As has been shown, it is immaterial which judge is presiding at this second phase hearing (the first phase being the "probable cause" hearing). Then the defendants, in their argument, attempt to by-pass the issue of perjuriousness entirely, and substitute for it some different criteria. These are issues which have been entertained by several federal courts - questions pertaining to the effects of misrepresentation, mistake, negligence, recklessness, and the severability of such matters if they are found to exist. Obviously it would be easier to attack the warrant on grounds that an affidavit was recklessly or negligently made than on the ground of perjury.

> "Perjury is a powerful word, but it must be recognized that no other will suffice . . . If the motion to suppress is successful, no other conclusion is possible but that the affiant officer deliberately lied to the magistrate." ("A Dilemma For Defense Counsel", Joseph D. Grano, Law Forum, Vol. 1971, p. 408).

The quotations below constitute the defendants' disclaimer of any charge of perjury (Emphasis is supplied).

In defense counsel's memorandum of law he states (page 7):

> "The Court having been misled by virtue of a misstatement, though mayhaps not not (sic) perjurious testimony, the warrant should be vitiated on these grounds alone."

On page 12 of the memorandum he states:

> "It is not the intention of the writer to ascribe to the applicant nor those who gave sworn testimony deliberate perjury. Rather

it is the intention of the writer to indicate that the whole truth was not within them and that there were severe errors in recollection or judgment which lead to the issuance of this warrant."

In the minutes of the hearing before me, at page 14 (Mr. Sutter is for the defendants, Mr. Delligatti is the Assistant District Attorney):

"THE COURT: This is what we call the Alfinito issue, right?

MR. SUTTER: No, sir.

THE COURT: No?

MR. SUTTER: No, sir.

MR. DELLIGATTI: I believe Judge Altimari would agree that this is the Alfinito issue.

THE COURT: I don't know what else it can be.

MR. SUTTER: Well, if Your Honor please, there comes a time in every course of litigation when new theories are advanced and when Appellate Courts rule upon them. I have never -- and I know Your Honor has read my argument before Judge Altimari and I was very cautious to never accuse any Nassau County detective of perjury, and I told him point blank that I would not do so unless I have concrete evidence of it. We have some evidence, which in Judge Altimari's opinion led, I would assume, to the conclusion that there might have been a mistake made. Now, if a mistake has been made, we go way back to the original coram nobis situations. I don't accuse the affiant of lying. I don't accuse any of these detectives of wilfully perjuring themselves.

I do doubt the statements that were made by the superintendent, and I wonder whether or not some day there will come a theory that if the entire warrant is a fraud upon the Court, inadvertently brought about by law enforcement officials, whether or not that is not void ab initio. That is the issue that we raise here today."

See also the statement of the Assistant District Attorney at Page 16:

"MR. DELLIGATTI: Mr. Sutter is correct. He never in his argument before Judge Altimari accused any police officer of perjury, and he was very careful not to . . ."

Mr. Sutter on Page 19 (discussing a hypothetical example):

"MR. SUTTER: Now, the question presented here is is that warrant valid based upon perjury not of the police officer, because the police officer reports accurately that which I say, but the whole thing is a hoax.

THE COURT: Well, it gets back to what we mentioned before, it seems to me, which is that we have established authority that this doesn't vitiate the warrant, whereas you claim that there should be a change in the law and some day it will come.

MR. SUTTER: At least on a Federal level . . ."

On pages 50 - 52, Mr. Sutter states his intention of showing that the superintendent lied to the detective, giving him false information, thereupon this exchange occurred:

"MR. SUTTER: As soon as I call the superintendent, who allegedly saw what was inside that room, and we establish that he couldn't have gotten in there to see it.

. . . .

Now, I intend to tie this together to show that, No. 1, he misled the detective completely, that it was a mere suspicion on his part, that he was never in that room, that he couldn't have gotten into it . . .

MR. DELLIGATTI: I still object, Your Honor, on the ground that it does not go to whether or not Sergeant Lang's affidavit is perjurious or incorrect.

THE COURT: It seems to me it's all directed to information of the person I referred to previously as an informant, meaning, the superintendent.

MR. SUTTER: This portion is, yes, Your Honor.

THE COURT: Well, is that relevant to what I call an Alfinito hearing?

MR. SUTTER: Not under New York Standards today.

THE COURT: Then, I am going to have to limit it to those standards.

MR. SUTTER: In other words, you will not let me go beyond the restrictions that have been placed by the Court of Appeals, though not affirmed in any manner by the Supreme Court?

THE COURT: That's correct.

MR. SUTTER: In other words, you will not allow me to develop that maybe the superintendent perpetrated a fraud upon this Court in the issuance of a warrant?

THE COURT: That's correct.

MR. SUTTER: Or a fraud upon Sergeant Lange?

THE COURT: Right.

MR. SUTTER: Okay.

I should not say "okay". I did not mean to be disrespectful, and I don't want the record to indicate that I was in any manner.

THE COURT: No, I didn't take it as such, Mr. Sutter."

The defendants advert to alleged mistakes and contradictions in the affidavits and testimony and urge that these may constitute a fraud on the Court (but not perjury) and that this should be sufficient to vitiate the basis for the warrant. Defense counsel cites no authority for this argument other than a general reference to federal rulings. An example of such a federal ruling is the recent case of United States v. Thomas, 489 F 2d 664 (CCA5)(see also the cases cited therein).

In one case published recently (People v. Nieves, Sup. Court, New York County, NYLJ 5-7-74, Page 19, Col.4) the New York court did allow itself to be drawn into what the court termed "the thicket of previous decisions involving the issues of innocent misrepresentation, reckless or intentional misrepresentation, fraud, perjury and questions of severability of portions of the affidavit (note, Columbia Law Review, Vol. 7, p. 1531).

There are no New York appellate court rulings supporting this contention of which I am aware.

On the other hand, as already outlined above, the New York appellate courts have clearly stated that the applicable measure for testing the validity of a warrant is perjuriousness of the statements made by the affiant. Most recently this was the pronouncement by the First Department in People v. Porter, 44 A.D. 2d 251, 354 N.Y.S. 2d 424.

For a period of upwards of five years opinions of several federal courts entertaining the issues of the effects of various kinds of misrepresentations upon warrants and eavesdropping orders have been published. The United States Supreme Court has not ruled on the issue, however. Our New York appellate courts have had ample opportunity to adopt this expanded basis for attack on warrants beyond perjuriousness. They have not done so. I consider it inappropriate for this nisi prius court to attempt to do so.

Aside from the failure to deal with the issue of perjury the defendant was in the anomalous position of attempting to attack the credibility of the superintendent and then using the statements of the superintendent to attempt to attack the credibility of the detective.

However, the recollection of the superintendent was so self-contradictory, vague and vacillating as to be virtually useless as a basis for contradicting another person, let alone proving perjury. Several pages of examples of this kind of testimony by the superintendent (commencing on page 110) could be cited. Then there was a direct contradiction by the building owner of the testimony of the superintendent as to who had entered the apartment involved.

In one instance, the statement of the detective in his affidavit that "Tiny" (one of the defendants) had put a deadlock on the door and refused to give the superintendent a key appears to be patently incorrect. It conflicts with the other statements made by the detective concerning the deadlock. Taking into account the muddled state of the superintendent's mental processes I believe the discrepancy can be ascribed to a failure of accurate communication with the superintendent.

In this case I am constrained to apply the standard laid down by the Court of Appeals in People v. Alfinito (supra), viz.:

> "We hold as follows: first, that section 813-c of the Code of Criminal Procedure is to be construed so as to permit an inquiry as to whether the affidavit's statements were perjurious; second, that the burden of proof is on the person attacking the warrant (see United States v. Goodwin, 9 Cir., 1 F.2d 36; United States v. Napela, 2 Cir., 28 F.2d 893), and third, that any fair doubt arising from the testimony at the suppressal hearing as to whether the affidavit's allegations were perjurious should be resolved in favor of the warrant since those allegations have already been examined by a judicial officer in issuing a warrant."

The issue is one of perjury and the defendants having disclaimed any allegation of perjury and having failed to meet the burden of proof required to prove perjury, the motion to suppress must be denied.

SO ORDERED.

E N T E R

DATED: June 19th, 1974

DOUGLAS F. YOUNG
J.C.C.

HON. HENRY J. LATHAM, ACTING P.J.
HON. CHARLES MARGETT
HON. VINCENT D. DAMIANI
HON. MARCUS G. CHRIST
HON. JOSPEH F. HAWKINS
Associate Justices

The People of the State of New York,

Respondent,

v.

Martin Kahn and Ernest Fendt,

Appellants.

Order on Appeals from Judgments.

In the above entitled cation, the above named Martin Kahn and Ernest Fendt, defendants in this action, having appealed to this court from two judgments (one as to each defendant) of the County Court, Nassau County, both rendered October 11, 1974; and the said appeals having been argued by Gino Papa, Esq., of counsel for the appellants and argued by Anthony J. Girese, Esq., of counsel for the respondent, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the two judgments appealed from are hereby unanimously affirmed, and it is further

ORDERED that the case is hereby remitted to the County Court, Nassau County, for proceedings to direct appellants to surrender themselves to said court in order that execution of the judgments be commenced or resumed (CPL 460.50, subd. 5).

Enter:

Clerk of the Appellate Division.

State of New York

Court of Appeals

BEFORE: HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

MARTIN KAHN and
ERNEST FENDT

CERTIFICATE
DENYING
LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
March 4, 19 76

Sol Wachtler
Associate Judge

*Description of Order: Judgment of County Court, Nassau, October 11, 1974; affirmed by Appellate Division, Second Department, January 28, 1976.

A-11 Exhibit B

Notary Public
No. 30-4605002
Qualified in Nassau County
Commission Expires March 30, 1977

5-21-76

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76C 801

----------X

UNITED STATES OF AMERICA, ex rel.,
MARTIN KAHN and ERNEST FENDT,

Petitioners,

- against -

ORDER TO SHOW CAUSE

WALTER J. FLOOD, as Warden of the Nassau County Correctional Facility, and the People of the State of New York by and through the Hon. Denis Dillon, District Attorney of the County of Nassau,

Respondents.

----------X

Upon the verified petition, the exhibits annexed thereto and the exhibit submitted under separate cover herewith of John Joseph Sutter, Esq., attorney for Martin Kahn and Ernest Fendt, petitioners, for issuance of a Writ of Habeas Corpus, it is,

ORDERED, that the respondents, by and through the District Attorney of the County of Nassau, show cause before this court at the courthouse thereof, 225 Cadman Plaza East, Brooklyn, New York, on the 7th day of May, 1976, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard,

(1)

why a Writ of Habeas Corpus should not issue herein as prayed for in said petition; and why the petitioners should not be released on bail during the pendency of the proceedings initiated herein; and it is further

ORDERED, that service of this order to show cause and a copy of the petition and exhibits attached thereto and exhibit submitted under separate cover on the respondent District Attorney of the County of Nassau, on or before the 3rd day of May, 1976 at 5:00 o'clock in the afternoon be deemed sufficient service.

Dated: May 3, 1976

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA, ex rel.,
MARTIN KAHN and ERNEST FENDT,

Petitioners,

- against -

WALTER J. FLOOD, as Warden of the
Nassau County Correctional Facility,
and the People of the State of New
York by and through the Hon. Denis
Dillon, District Attorney of the County
of Nassau,

Respondents.

----------X

TO: THE HONORABLE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

The petition of Martin Kahn and Ernest Fendt, by and through their attorney, the relator, JOHN JOSEPH SUTTER, ESQ., respectfully shows that:

1. Petitioners are citizens of the United States of America and of the State of New York and reside within the Eastern District of New York.

2. That on October 7, 1974 the petitioners were convicted of possession of gambling records in the first degree based upon their pleas of guilty entered July 11, 1974, in the Nassau County Court, Nassau County, New York, within the Eastern

District of the State of New York. That the petitioner, Kahn, was sentenced to a monetary fine and a ten month period of incarceration and the petitioner, Fendt, was sentenced to a monetary fine and a 45 day term of incarceration, said periods of incarceration to be served at the Nassau County Correctional Facility within the Eastern District of the State of New York.

3. That by order entered January 28, 1976 (a copy of which is annexed hereto as Exhibit A) the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, unanimously affirmed the petitioners' convictions without opinion. That by certificate dated March 4, 1976 (a copy of which is annexed hereto and marked Exhibit B), the Hon. Sol Wachtler, Associate Judge of the New York State Court of Appeals, denied petitioners' application for leave to appeal to that court. That the petitioners have now fully exhausted their state remedies within the meaning of Section 2254, subdivision c of Title 28, United States Code.

4. That prior to the entry of their guilty pleas, the petitioners sought by motion to suppress physical evidence seized pursuant to a search warrant on the basis of the lack of probable cause due to the insufficiency of the underlying affidavits and testimony before the issuing judge. Said motion

was denied, but a hearing was granted on the issue of veracity and accuracy of the affidavit and testimony.

5. The hearing was held before the Hon. Douglas F. Young, Nassau County Court Judge, who held that the hearing was properly before him and that the defendants had failed to prove perjury by the affiant and, therefore, the motion to suppress must be denied (a copy of the complete appendix on appeal at the New York State Supreme Court, Appellate Division, Second Department, containing all motions, decisions and minutes of the hearing is submitted herewith under separate cover).

6. An order of the New York Supreme Court (Hon. L. Kingsley Smith, Justice) was entered on October 21, 1974 staying the execution of the judgments pending appeal. The defendants, having exhausted their state appellate remedies, are currently free on such bail due to the graciousness of the Nassau County District Attorney's office in extending the date of surrender and incarceration to May 10, 1976 in order that petitioners may bring on this application.

7. That it is most respectfully submitted that the petitioners herein did not receive a full, fair and adequate hearing in the state court proceedings, and were denied due process of law, in that the trial judge refused to suppress

evidence illegally obtained from the petitioners by a search warrant which was based on an affidavit and testimony containing material misstatements of fact as was manifestly demonstrated by the testimony adduced at said hearing; and that the trial court by the very language of its decision rejected the federal standards of the overwhelming majority of the Circuit Courts of Appeals on this important Fourth Amendment issue and limited the issues to what the trial court felt was a very narrow New York State or "Alfinito" rule. This is evident in the decision wherein Judge Young stated:

> "For a period of upwards of five years opinions of several federal courts entertaining the issues of the effects of verious kinds of misrepresentations upon warrants and eavesdropping orders have been published. The United States Supreme Court has not ruled on the issue, however. Our New York appellate courts have had ample opportunity to adopt this expanded basis for attack on warrants beyond perjuriousness. They have not done so. I consider it inappropriate for this nisi prius court to attempt to do so."

The remainder of said opinion dealt with your relator's alleged avoidance of the "perjury" issue and your relator's advocacy of another point of law not pertinent to the within application.

8. That it is respectfully submitted that the singularly unenlightening "affirmed no opinion" decision of the New York State Supreme Court, Appellate Division, Second

Department, and the subsequent simple denial of leave to appeal to the Court of Appeals (Exhibits A and B), leave as the law of the case only the decision of Judge Young wherein he clearly felt that the standards regarding misrepresentations by affiants adopted in the federal cases were broader than the narrow confines of New York case law, but felt it inappropriate for his court to adopt those standards.

9. Given this limitation on the Fourth Amendment rights of the petitioners imposed by the trial court below and endorsed by the inaction of the appellate state courts, it is respectfully submitted that the petitioners' Fourth Amendment rights have been violated. The petitioners rely herein on their statement of facts and Point I of their brief submitted to the New York State Supreme Court, Appellate Division, Second Department (a copy of which is annexed hereto as Exhibit C), with the addition of a case from the Eighth Circuit Court of Appeals (U.S. v. Marihart, 492 F. 2d 897).

10. That this court's attention is most respectfully drawn to a relatively recent case from the United States District Court for the District of New Jersey which deals with a situation

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Qualified In Nassau County
Commission Expires March 30, 1977

similar to the case at Bar and sets forth an (perhaps too) exhaustive study of current federal law on the subject.[1]

11. That it is most respectfully submitted from the above that the petitioners' rights have been violated in the state proceeding by the state courts' narrow view of the law regarding misrepresentations and search warrants which view overemphasized the semantics of a single word "perjury" to the total exclusion of the broader federal standards regarding this important Fourth Amendment question.(a glaring example of a material misstatement is contained in Detective Sergeant Lang's supplemental testimony before Judge Altimari where he states, ". . .the only two individuals ever seen entering the apartment have been identified as a Mr. Ernest Fendt and Mr. Martin Kahn by me. ." The testimony at the hearing makes this manifest, where Lang now claims that he didn't really mean a single apartment but the apartment building, where at least fifty-five people were observed entering and leaving, and maintains he's still technically correct since the only two of this multitude he bothered to identify were his targets. This is pure hogwash. Whether it be

[1] U.S. ex rel. Petillo v. New Jersey, 400 F. Supp. 1152 (your relator is informed that briefs have been filed with the Third Circuit Court of Appeals, but that a date for argument has not as yet been set).

"perjury" or mere inarticulate verbiage by the affiant the clear implication and inference to be drawn therefrom by Judge Altimati made it a material misstatement under the federal standards. This was never dealt with in the opinion of the lower court given the self-imposed restrictions of that court's ruling.)

12. That no previous application for the relief sought herein has been made to any court, judge or justice.

WHEREFORE, petitioners respectfully pray that a Writ of Habeas Corpus be directed to the respondents to the end that proper inquiry may be had and that petitioners thereby be relieved of the unconstitutional convictions and sentences imposed upon them and why the petitioners should not be released on bail during the pendency of the proceedings initiated herein, together with such other, further and different relief as to this court may seem just and proper.

Respectfully submitted,

JOHN JOSEPH SUTTER, ESQ., Relator
Attorney for Martin Kahn & Ernest Fendt
Office & P. O. Address
33 Willis Avenue
Mineola, New York 11501
(516) 747-5800

A- 20

No. 30-4598082
Qualified in Nassau County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OFAMERICA ex rel.
MARTIN KAHN and ERNEST FENDT,

Petitioners,

- against -

WALTER J. FLOOD, as Warden of the
Nassau Correctional Facility, and
The People of the State of New York
by and through the Hon. Denis Dillon,
District Attorney of the County of Nassau

Respondents.

----------x

JUDGMENT

76 C 801

A memorandum and order of Honorable George C. Pratt, United States District Judge, having been filed on July 16, 1976, dismissing the petition for a writ of habeas corpus, it is

ORDERED and ADJUDGED that the petitioner take nothing of the respondent and that the petition is dismissed.

Dated: Brooklyn, New York
July 16, 1976

Lewis Orgel
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- x

UNITED STATES OF AMERICA, EX REL.
MARTIN KAHN and ERNEST FENDT,

Petitioners,

- against -

WALTER J. FLOOD, as Warden of the Nassau Correctional Facility, and The People of the State of New York by and through the Hon. Denis Dillon, District Attorney of the County of Nassau,

Respondents.

- x

DOCKET NO. 76 C 801

MEMORANDUM AND ORDER

By this habeas corpus proceeding (28 U.S.C. Sec. 2254) petitioners seek to review and set aside their state court conviction on the ground that the state court refused to suppress evidence seized pursuant to a search warrant which petitioners claim violated their constitutional rights under the Fourth and Fourteenth Amendments.

Petitioners contend that the affidavits and oral testimony underlying the search warrant contained knowing, material misstatements and misrepresentations of fact which under a properly applied standard for federal review require suppression of the evidence seized under the warrant. This

contention was aired at an evidentiary hearing held by the Nassau County Court on petitioners' motion to suppress. When that Court denied the motion, petitioners pleaded guilty to illegal possession of gambling records.

Petitioners then appealed to the Appellate Division, Second Department of the New York State Supreme Court, urging error in the County Court's refusal to suppress the evidence seized under the warrant. That Court affirmed unanimously and without opinion. Petitioners' subsequent application for leave to appeal to the New York State Court of Appeals was denied by Judge Wachtler on March 4, 1976. Following procedures established by many prior decisions, petitioners brought this proceeding to obtain federal review of their claimed denial of federal constitutional rights against unlawful searches and seizures.

Whatever may be the merits of petitioners' argument, we may not now consider them, for the Supreme Court in Stone v. Powell, (44 U.S.L.W. 5313) on July 6, 1976 closed the federal District Courts to habeas review of state court search and seizure issues where the state has provided an opportunity for full and fair litigation of the claim.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, ex rel.,
MARTIN KAHN and ERNEST FENDT,

Petitioners,

- against -

WALTER J. FLOOD, as Warden of the Nassau Correctional Facility, and The People of the State of New York by and through the Hon. Denis Dillon, District Attorney of the County of Nassau,

Respondents.

----------X

NOTICE OF APPEAL

DOCKET #76 C 801

Notice is hereby given that MARTIN KAHN and ERNEST FENDT, the petitioners above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the memorandum and order dismissing the habeas corpus proceeding filed in the office of the clerk on July 15, 1976 and received by attorneys for the petitioners on July 22, 1976.

Dated: Mineola, New York
July 22, 1976

GINO PAPA of SUTTER, MOFFATT, YANNELLI & ZEVIN, P.C.
Attorneys for the petitioners,
Martin Kahn & Ernest Fendt
Office & P. O. Address
33 Willis Avenue
Mineola, New York 11501
(516) 747-5800

TO:
HON. DENIS DILLON
District Attorney,
Nassau County
County Courthouse
262 Old Country Road
Mineola, New York 11501

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, ex rel.,
MARTIN KAHN and ERNEST FENDT,

Petitioners,

-against-

WALTER J. FLOOD, as Warden of the Nassau Correctional Facility, and THE PEOPLE OF THE STATE OF NEW YORK by and through the HON. DENIS DILLON, District Attorney of the County of Nassau,

Respondents.

----------X

NOTICE OF MOTION FOR CERTIFICATE OF PROBABLE CAUSE

76 C 801

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of EDWIN IRA SCHULMAN, ESQ., the annexed Exhibits and upon all of the pleadings and proceedings heretofore had herein, the undersigned will move this Court, at a Motion Term thereof to be held before the HON. GEORGE C. PRATT, United States District Court Judge, for the Eastern District of New York, at the United States Courthouse located at 225 Cadman Plaza East, Brooklyn, N.Y., on the 24th day of September, 1976 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an Order granting a Certificate of Probable Cause.

Dated: Brooklyn, New York
August 26, 1976

Yours, etc,

SCHULMAN & LAIFER
Attorneys for Petitioners
Office & P.O. Address
16 Court Street
Brooklyn, New York 11241

A- 2.69

TO:

CLERK OF THE UNITED STATES
DISTRICT COURT
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

DENIS DILLON, ESQ.
District Attorney
Nassau County
262 Old Country Road
Mineola, New York

WALTER J. FLOOD
Warden of Nassau County
Correctional Facility
East Meadow, N.Y.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, ex rel.,
MARTIN KAHN and ERNEST FENDT,

Petitioners,

-against-

WALTER J. FLOOD, as Warden of the Nassau Correctional Facility, and THE PEOPLE OF THE STATE OF NEW YORK by and through the HON. DENIS DILLON, District Attorney of the County of Nassau,

Respondents.

----------X

STATE OF NEW YORK)
SS.:
COUNTY OF KINGS)

EDWIN IRA SCHULMAN, being duly sworn, deposes and says:

Your deponent is an attorney associated with the firm of SCHULMAN & LAIFER,ESQS., attorneys for the Petitioners herein and makes this affidavit in support of the annexed Notice of Motion.

In the interest of brevity, your deponent reasserts the argument set forth in a previous affidavit of STEPHEN R. LAIFER, ESQ., duly sworn to the 27th day of July, 1976, submitted in support of Petitioners' motion for a Stay of Execution, which was granted by Order of this Court August 10, 1976 and incorporates it into the argument herein. See photostatic copy of Affidavit annexed hereto and marked Exhibit A.

The Petitioners' contention set forth in their verified petition is that they were denied a full, fair and adequate hearing in the state Court proceedings in that the trial judge limited the issue to perjurious statements contained in the

application for the search warrant, completely disregarding the issue whether said application contained material misrepresentation that reduce the proof below probable cause.

As mandated by the Fourth Amendment to the United States Constitution, no warrants shall issue but upon a showing of probable cause.

As a means of implementing said constitutional guarantee, the New York State Legislature enacted Article 690 of the Criminal Procedure Law mandating in part that the application for the warrant must contain a statement that there is reasonable cause to believe that the property described may be found in or upon a designated or described place and allegations of fact supporting such statement. (CPL 690.35 Sd. 2 (b),(c)

In short, it is the petitioners' contention that a misstatement of fact is tantamount to no fact at all and that the trial Court, by refusing to consider misstatement of facts denied petitioners' a full, fair and adequate hearing. The fact that the trial Court followed the narrow NEW YORK STATE or "Alfinito" rule as enunciated by the New York State Court of Appeals,,compounds the denial of due process by denying Petitioners adequate Appellate Review in the State level.

Although a state is free to develope its own law of search and seizure to meet the needs of local law enforcement, and in the process it may call the standards it employs by any names it may choose, it may not authorize police conduct which touches upon the Fourth Amendment Rights, regardless of the labels which it attaches to such conduct. SIBRON V. N.Y., 392, U.S. 40

It is submitted, the "Alfinito" rule as enunciated by the New York State Court of Appeals, infringes upon the Petitioners' Fourth Amendment Rights to such an extent, that Petitioners were denied an opportunity for a full,and fair litigation of their Fourth Amendment claim.

WHEREFORE, for the reasons stated herein, your deponent respectfully requests that a Certificate of Probable Cause be issued certifying that there is a question of law as to which there is substantial ground for a difference of opinion.

Sworn to before me this
26th day of August, 1976

Marilyn Claudio

MARILYN CLAUDIO
COMMISSIONER OF DEEDS
City of New York 2-1842
Certificate filed in Kings County
Commission Expires Dec. 1977

Edwin Ira Schulman

EDWIN IRA SCHULMAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, ex rel.,
MARTIN KAHN and ERNEST FENDT,

Petitioners,

AFFIDAVIT

-against-

WALTER J. FLOOD, as Warden of the Nassau Correctional Facility, and The People of the State of New York by and through the Hon. Denis Dillon, District Attorney of the County of Nassau,

Respondents.

----------X

STATE OF NEW YORK)
SS.:
COUNTY OF KINGS)

STEPHEN R. LAIFER, being duly sworn, deposes and says:

1. That your deponent is an attorney associated with the firm of SCHULMAN & LAIFER, ESQS., attorneys for the Petitioners herein and makes this affidavit in support of the annexed Order to Show Cause.

2. Pursuant to Title 28 U.S.C. Section 2254 Petitioners herein sought review of and to set aside their State Court convictions on the ground that the State Court refused to suppress evidence seized pursuant to a search warrant issuing in violation of their Constitutional Rights under the Fourth and Fourteenth Amendments.

3. Upon information and belief, following the evidentiary hearing held by the Nassau County Court, petitioners' motion to suppress was denied and petitioners pleaded guilty.

A-30 EXHIBIT "A"

4. Upon information and belief, petitioners' appeal from denial of the motion to suppress to the Appellate Division, Second Department of the New York State Supreme Court was unanimously affirmed and leave to appeal to the New York State Court of Appeals was denied.

5. Petitioners thereafter brought a proceeding pursuant Title 28 U.S. C. Section 2254 to review and set aside the State Court convictions.

6. That by written Memorandum and Order of this Court (Pratt, J.) filed July 15, 1976 this Court refused to entertain said proceeding based upon the Supreme Court decision of STONE V. POWELL, (44 U.S.L.W. 5313), indicating that said decision closed the Federal District Courts to habeas review of State Court search and seizure issues where the State has provided an opportunity for full and fair litigation of the claim. See photostatic copy of Order and Memorandum dated July 15, 1976 annexed hereto and marked Exhibit A.

7. That a Notice of Appeal was duly filed appealing said Order. See Exhibit B.

8. It is your deponent's contention on behalf of petitioners that the STONE case does not apply to the case at bar.

As a reading of the record indicated, defense counsel, prior to the evidentiary hearing, made application to hold the hearing before the HON. FRANK X. ALTIMARI, the Nassau County Judge who issued the search warrant in question. Although Judge Altimari was available to preside over said hearing the application was denied.

A-31

The Court reasoned that since the issue before the Court was with regard to the perjurious statements and/or material misrepresentations of fact by the officer affiant, probable cause was not in issue and therefore the Court of Appeals decision in PEOPLE V. McCALL, 17 N.Y. 2nd 152, was not controlling. In McCALL the Court stated: " The preferable way is to apply to vacate the Order to the Judge who made it ". PEOPLE V. McCALL, supra, Page 15[illegible]

Case law in this Circuit has held that where the affidavit contains either deliberate misrepresentations or material misrepresentations that reduce the proof below probable cause the warrant should be declared invalid. U. S. V. GONZALEZ, 488 F 2d 837, (2nd Cir. 1973); U.S. V. SULTAN, 463 F 2d 1066,1070 (2nd Cir. 1972); U.S. V. SOZZA, 365 F 2d 206.223-224 (2nd Cir. 1966); U.S. V. LaVECCHIA, 513 F 2d 1210, 1217-1218 (2nd Cir. 1975).

It is respectfully submitted that under the facts of this case where the material misrepresentations may have reduced the proof below probable cause Judge Altimari would be the only Judge who could give a fair determination as to whether the warrant would have issued. As such, the petitioners were denied an opportunity for a full and fair litigation of their claim.

9. Furthermore, under the facts of this case wherein it is alleged that a fraud was perpetrated against the Court by a law enforcement officer for the purpose of securing a search warrant, the policy behind enforcing the exclusionary rule far outweights society's costs in applying the rule.

10. Upon information and belief, that during the pendency

of the within action the petitioners have always been available for Court process, have always appeared when requested, and will remain subject to the order of this or any other Court and will surrender to commence the execution of judgment, if said appeal should be denied.

WHEREFORE, for the reasons stated hereinbefore your deponent respectfully requests that the relief be granted herein.

Sworn to before me this

7th day of July, 1976

STEPHEN B. LAIFER

NOTARY PUBLIC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA, ex rel.,
MARTIN KAHN and ERNEST FENDT,

Petitioner-Appellants,

-against-

AFFIDAVIT OF SERVICE

WALTER J. FLOOD as Warden of the Nassau Correctional Facility, and THE PEOPLE OF THE STATE OF NEW YORK by and through the HON. DENIS DILLON, District Attorney of the County of Nassau,

Respondent-Appellees.

----------X

STATE OF NEW YORK)
SS.:
COUNTY OF KINGS)

MARILYN CLAUDIO, being duly sworn, deposes and says:

That deponent is not a party to the action and is over 18 years of age and resides at 16 Court Street, Brooklyn, N.Y.

That on the 16th day of November, 1976 deponent served the within copy of brief and appendix upon Denis Dillon, District Attorney and Walter J. Flood Warden, at 262 Old Country Road, Mineola, N.Y., and Correctional Facility, East Meadow, New York, respectively, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office-official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this
16th day of November, 1976

Edward Lee Schaber

Marilyn Claudio

Notary Public, State of New York
Qualified in Suffolk County
Term Expires March 30, 1977

Mark Appropriate Boxes

Blackstone Stationers, Inc., Lynbrook, N.Y. (212) 527-4200 (516) 599-6411

☐ INDIVIDUAL VERIFICATION

STATE OF NEW YORK, COUNTY OF ss.:

, being duly sworn, deposes and says, that

deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

☐ CORPORATE VERIFICATION

deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation. Deponent is an officer thereof, to-wit, its The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

☐ ATTORNEY'S AFFIRMATION

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State, shows, that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief; and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

☐ CERTIFICATION BY ATTORNEY

certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated

☒ AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF KINGS ss.:

Marilyn Claudio

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

16 Court St, Brooklyn, N.Y.

That on the 16th day of Nov 19 76 deponent served the within copy of brief & appendix upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office-official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ AFFIDAVIT OF PERSONAL SERVICE

upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 19

NOTICE OF ENTRY

Sir : PLEASE TAKE NOTICE that the within is a true certified copy of a

duly entered in the office of the clerk of the within named court on 19

Dated: 19

Yours, etc.,

SCHULMAN & LAIFER

Attorneys for

Office and Post Office Address
16 COURT STREET
BROOKLYN, N. Y. 11241

To:

Attorney for

NOTICE OF SETTLEMENT

Sir : PLEASE TAKE NOTICE that

of which the within is a true copy will be presented for settlement to Mr. Justice

one of the Justices of the within named Court at

on the day of 19

at M.

Dated: 19

Yours, etc.,

SCHULMAN & LAIFER

Attorneys for

Office and Post Office Address
16 COURT STREET
BROOKLYN, N. Y. 11241

To: Esq.

Attorney for

Index No 76-2138 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel.,
MARTIN KAHN and ERNEST FENDT,

Petitioner-Appellants,

-against-

WALTER J. FLOOD as Warden of the Nassau Correctional Facility, and THE PEOPLE OF THE STATE OF NEW YORK by and through the HON. DENIS DILLON, District Attorney of the County of Nassau,

Respondent-Appellees

AFFIDAVIT OF SERVICE

SCHULMAN & LAIFER

Attorneys for Petitioner-Appellants

Office and Post Office Address
16 COURT STREET
BROOKLYN, N. Y. 11241
UL 5-5840-8855

To: Esq.

Attorney for

Service of a copy of the within is hereby admitted.

Dated, N.Y., 19

Attorney for

BLACKSTONE STATIONERS, INC. 585 MERRICK RD. LYNBROOK, N. Y.

NOTICE OF ENTRY

Sir : PLEASE TAKE NOTICE that the within is a true certified copy of a

duly entered in the office of the clerk of the within named court

on 19

Dated: 19

Yours, etc.,

SCHULMAN & LAIFER

Attorneys for

Office and Post Office Address
16 COURT STREET
BROOKLYN, N. Y. 11241

Attorney for

NOTICE OF SETTLEMENT

Sir : PLEASE TAKE NOTICE that

of which the within is a true copy will be presented for settlement to Mr. Justice

one of the Justices of the within named Court at

on the day of 19

at M.

Dated: 19

Yours, etc.,

SCHULMAN & LAIFER

Attorneys for

Office and Post Office Address
16 COURT STREET
BROOKLYN, N. Y. 11241

To: Esq.

Attorney for

DOCKET XXXX No. 76 C 801 19

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEWYORK

UNITED STATES OF AMERICA,ex rel.,
MARTIN KAHN and ERNST FENDT,

Petitioners,

-against-

WALTER J. FLOOD,as Warden of the Nassau Correctional Facility, and THE PEOPLE OF THE STATE OF NEW YORK,by and through the HON. DENIS DILLON, District Attorney of the County of Nassau,

Respondents.

NOTICE OF MOTION AND AFFIDAVIT

SCHULMAN & LAIFER
Petitioners

Attorneys for

Office and Post Office Address
16 COURT STREET
BROOKLYN, N. Y. 11241
UL 5-5840-3855

To: Esq.

Attorney for

Service of a copy of the within is hereby admitted

Dated, N.Y., 19

Attorney for

BLACKSTONE STATIONERS, INC. 585 MERRICK RD. LYNBROOK, N. Y.